

COOK COUNTY SHERIFF'S MERIT BOARD

Sheriff of Cook County)
vs.)
Dorian J. Swain) Docket No. 1879
Correctional Officer)
Star # 16579)

DECISION

This matter coming on to be heard pursuant to notice before Kim R. Widup, Board Member, on June 28, 2016, the Cook County Sheriff's Merit Board finds as follows:

Jurisdiction

Dorian J. Swain, hereinafter Respondent, was appointed a Correctional Officer for the Cook County Department of Corrections (CCDOC) on November 22, 2010. Respondent's position as a Correctional Officer involves duties and responsibilities to the public; and

Each member of the Cook County Sheriff's Merit Board, hereinafter Board, has been duly appointed to serve as a member of the Board pursuant to confirmation by the Cook County Board of Commissioners, State of Illinois, to sit for a stated term; and

The Board has jurisdiction of the subject matter of the parties in accordance with Chapter 55 of the Illinois Compiled Statutes; and

The Respondent was personally served with a copy of the Complaint and notice of hearing and appeared before the Board with counsel to contest the charges contained in the Complaint; and

The Board has heard the evidence presented by the Sheriff and the Respondent and has evaluated the credibility of the witnesses and supporting evidence. After considering the evidence, the Board finds as follows:

Background

On November 22, 2010, the Respondent was appointed a Correctional Officer. On March 10, 2011, the Respondent was assigned to the External Operations Unit, CCDOC, 2834 w. 31st St, Chicago, IL. On November 1, 2012, the Respondent was assigned to Division X of the CCDOC, 2950 S. California Ave, and on August 26, 2013, the Respondent was assigned to Division VIII of the CCDOC, 2800 S. California Ave. On October 28, 2012, the Respondent was assigned to Receiving Trust and Classification (RTC) of the CCDOC, 2750 S. California Ave. On March 10, 2013, the Respondent was assigned to Division XVII (Women's Justice Department), CCDOC, 2700 S. California, Chicago, IL.

On July 17, 2012, the Respondent attended a [REDACTED] meeting at [REDACTED]. During the [REDACTED] meeting at [REDACTED], the Respondent removed his duty weapon

and holster from his waist and placed his duty weapon and holster inside his bag. The Respondent failed to adequately secure his duty weapon by placing his duty weapon in a bag and leaving the bag unattended. After the meeting, the Respondent retrieved his duty weapon from his bag and placed his duty weapon back on his waist.

On August 24, 2015, the Respondent provided an audio-recorded statement to investigators from the Cook County Sheriff's Office of Professional Review (OPR). The Respondent admitted to investigators from OPR that he placed his duty weapon in a bag on July 17, 2012. On August 24, 2015, the Respondent admitted to investigators from OPR that he left the bag with his duty weapon unattended on July 17, 2012.

By complaint dated February 23, 2016, upon a finding of guilt, the Petitioner sought the suspension of the Respondent from the Cook County Sheriff's Department for a period of sixty days.

Issues Presented

The Respondent was charged based on his actions detailed above with violations of the Rules and Regulations and General Orders of the Cook County Sheriff's Department, specifically:

Cook County Department of Corrections General Order 3.8 – Ethics and Standards of Conduct, in its entirety, including but not limited to, the following subparts:

I. POLICY

It is the policy of the Cook County Department of Corrections (CCDOC) that employees will conduct themselves in a professional and ethical manner, both on and off duty. Employees will not engage in activities unbecoming of county employees, or conduct that reflects unfavorably to the Office of the Sheriff of Cook County.

III. REQUIREMENTS

The CCDOC Code of Ethics requires the highest level of conduct from all employees. It is the expectation that sworn and civilian employees conduct themselves with high standards of professional conduct and behavior. Employees that fall to maintain high standards of conduct and ethics, will be subject to corrective or disciplinary action, and may include recommendation for termination.

A. Compliance with Laws and Regulations

4. Employees will comply with lawful departmental rules, written procedures, directives, bulletins, and verbal orders issued by the proper authorities.

Cook County Department of Corrections General Order 4.1 – Internal Investigations, in its entirety, including but not limited to, the following subparts:

III. REQUIREMENTS

Less serious misconduct would include those violations of Department of Corrections rules, orders and procedures which pose no threat to the safety or security of correctional staff, inmates, or the institution.

Included also is less serious misconduct which is administrative in nature as it pertains to an officer/civilian's relationship with his or her superiors or work performance.

B. Guidelines for LESS SERIOUS MISCONDUCT include but are not limited to:

2. Failure of a sworn officer to comply with Department weapons regulations.

Cook County Department of Corrections General Order 3.14 – Firearms Possession, Authorization, Registration and Locking Devices, in its entirety, including but not limited to, the following subparts:

I. POLICY

It shall be the policy of the Cook County Department of Corrections (CCDOC) that sworn and duly authorized members of the Department meet stringent guidelines regarding firearms possession, authorization, registration and weapon locking devices.

III. PROCEDURES

I. Prescribed Duty Weapon Locking Device

2. Responsibilities

- a. It is the obligation and responsibility of each sworn Cook County Sheriff's Office (CCSO) member to ensure adequate and safe storage of his/her prescribed duty weapon and that proper handling procedures are followed to avoid any negligent discharges.
- c. When not having "an alternate means" to secure the prescribed duty weapon the weapon shall be secured on his/her person.

Note: "Alternate means," as used in this order, shall be defined as securing the prescribed duty weapon in a securely locked box or container, or securing the prescribed duty weapon in another location that a reasonable person would believe will prohibit access to the prescribed duty weapon by unauthorized individuals and meets the requirements of 720 ILCS 5/24-9.

Furthermore, the Respondent's actions violated the Rules and Regulations of the Cook County Sheriff's Merit Board, specifically:

Cook County Sheriff's Department Merit Board Rules and Regulations, in its entirety, including but not limited to, the following subparts:

Article X, Paragraph B:

No Police Officer, Police Sergeant, Police Lieutenant of the Cook County Sheriff's Police Department, Correctional Officer, Correctional Sergeant, Correctional Lieutenant, Correctional Captain of the Cook County Department of Corrections or Deputy Sheriff, Deputy Sergeant, Deputy Lieutenant of the Cook County Sheriff's Court Services Department will:

3. Violate any of the Sheriff's Executive Orders, General Orders, Special Orders, Directives or Rules and Regulations of the Cook County Sheriff's Department or Cook County Sheriff's Merit Board Rules and Regulations.

Findings of Fact

This matter was called for trial on July 28, 2016, after the case was continued on several occasions based upon the needs of the Petitioner (Sheriff) and/or the Respondent's request through counsel, and the completion of all discovery matters. At the trial, with a court reporter being present, all witnesses were sworn under oath. The Respondent did testify. During the trial documents were introduced by the Sheriff and the Respondent that were received into evidence. Additionally, there were certain documents that were admitted as exhibits through agreed upon stipulations by both parties. The Sheriff and Respondent made closing arguments addressing issues in the trial.

Through stipulation between the parties, the following exhibits were introduced and admitted as joint exhibits: the complaint against the Respondent, dated February 23, 2016 (J-Exhibit 1); the Collective Bargaining Agreement (CBA) between the Sheriff and Teamsters Local 700 (J-Exhibit 2); and the OPR audio recording of the Respondent's administrative interview at OPR in August of 2015 (J-Exhibit 3).

The Sheriff introduced, without objection from the Respondent, collectively, the general orders at issue in the complaint: 3.14 Firearms Possession, Authorization, Registration and Locking Devices; 3.8 Ethics and Standards of Conduct; 4.1 Departmental Internal Investigations; and Article X of the rules and regulations of the Cook County Sheriff's Merit Board (all marked as Exhibit 1).

Respondent's counsel requested, without objection from the Sheriff, the Board take Judicial Notice of the statute cited in the general order for firearms requiring compliance entitled, *Firearms; Child Protection* (R-Exhibit 1). Notice was granted and it was admitted.

The Sheriff requested, with objection by the Respondent, that the first witness to be called by the Sheriff was to be the Respondent. The Sheriff further ask for leave to treat the Respondent as a hostile witness. After argument by the Respondent, the Board granted the Sheriff's request as the trial was an administrative matter and not a criminal matter.

Additionally, the Respondent requested the Board dismiss the allegation as being unfounded and frivolous that the Respondent said to OPR, in his audio recorded interview, that he left his weapon in a bag unattended. The Board noted the objection but denied the motion initially to determine if their existed a lack of foundation during the presentation of the evidence.

After a brief opening statement by the Sheriff and the Respondent, the Sheriff called the Respondent who testified he had been with the CCDOC since November of 2010. The Respondent testified he attended the training academy which included training on firearms certification. This firearms training also included information on weapons storage. He testified that he received training on the Sheriff's general orders while at the academy. He testified that he also received in-service training after the academy. This in-service training included firearm's certification. The Respondent testified that as part of his firearms training he signed a *Firearms Home Safety Checklist*, dated December 27, 2010 (Exhibit 4).

The Respondent testified that he was at a [REDACTED] meeting in July of 2012. He testified that he belonged to the [REDACTED]. He characterized the [REDACTED] as being a fraternal organization. The Respondent testified he attended a meeting on July 17, 2012, at his lodge and said there were 8-10 individuals there including himself. He testified that he did not hold an elected position. The Respondent testified that he had his duty

weapon with him during this meeting and it was loaded. He testified when he arrived at the meeting his weapon was on his person in a holster on his right side. The Respondent said at some point in the meeting "jackets were relaxed" and he removed his weapon and placed it in a messenger bag that he had with him. The messenger bag was closed with a zipper. The Respondent said he was seated approximately 12-15 feet away from the closest person to him. The Respondent testified that he was seated on a bench with the messenger bag on his right side. The Respondent said after the meeting he walked over and shook the [REDACTED] hand while keeping his bag with the weapon with him. The Respondent said he walked back to the bench, told an individual named [REDACTED] to get away from him (he described this earlier as being a joking manner) and then removed his weapon from the bag, put it back on and put his jacket on. He said he dropped the bag back in his car and came back in the lodge to eat with his weapon on underneath his jacket. The Respondent said his weapon was on his person for the remainder of the time.

The Respondent was played the audio recording of his interview with OPR (J-Exhibit 3) and was asked about moving chairs. The Respondent testified when he moved chairs his bag containing his service weapon remained with him. The Respondent said he did not ever take the bag off his person.

On cross examination, the Respondent testified there were other law enforcement officers who were members of the organization who carried their weapons to meetings. He said there was no prohibition for a law enforcement officer to bring their weapon to a meeting. He testified that when he removed his weapon from his person and put it in the bag he was not storing the weapon. He testified that his weapon was always in his possession while at the meeting by either being on his person in its holster or in the messenger bag that remained in his possession. The Respondent testified that he was not questioned by OPR whether he left the messenger bag unattended while at the meeting. The Respondent reviewed a group of documents that he identified as being certificates and other documents related to training that he had received (R-Exhibit 2).

After a brief redirect and re-cross, the Respondent completed his testimony.

[REDACTED], Investigator, OPR, testified that she had been with OPR since March of 2013. Investigator [REDACTED] testified that she conducted the investigation of the Respondent. She testified that she conducted a recorded interview of the Respondent in the presence of his counsel. She prepared a report of the Respondent's conduct in which she concluded that he violated General Order 3.14 for not adequately securing his weapon, General Order 4.1 that had to do with handling of a firearm and Article X for violating general orders. Investigator [REDACTED] testified that she cited him for not storing his weapon in a safe location and having his weapon accessible to other people. She further testified that the Respondent did not secure the weapon on his person and it was not in a secure location.

On cross examination, Investigator [REDACTED] testified that she interviewed three witnesses who attended the [REDACTED] meeting in July of 2012 and none of them saw the Respondent leave his bag unattended with his firearm inside. Investigator [REDACTED] testified that she told the Respondent that she had no problem with him taking his weapon off. Investigator [REDACTED] admitted she never asked the Respondent if he left the bag unattended. She testified that she did not ask him where the bag was in relation to the Respondent's person. She testified that she had initially closed her investigation and found the allegations against the Respondent as not sustained but changed it after a discussion with her supervisor. She testified:

"[REDACTED] then called me into his office and said, I reviewed your case, and during the accused interview, Officer Swain told you that he put his weapon into a bag and had this conversation with [REDACTED] and then walked bag to his bag and put his weapon on; isn't that right? I said, Yes. And he said, Well wouldn't you agree that's a violation of a general order? And I said, Yes. So he gave me my report back and I put the violations in there and turned the case back in."

Investigator [REDACTED] testified that she did not listen to the audio recording of the interview of the Respondent with her supervisor (J-Exhibit 3). She was played parts of the recording and testified that the Respondent did not mention leaving his bag unattended.

On redirect, Investigator [REDACTED] testified that she followed command channel review regarding her report.

The Sheriff rested and the Respondent moved for a directed verdict. The Board denied the motion.

The Respondent called [REDACTED], Superintendent, CCDOC. Superintendent [REDACTED] testified that she had been employed with CCDOC since 1991. She testified that when she was a lieutenant she supervised the Respondent. She testified the Respondent was a good employee and followed orders.

The Respondent rested and both parties delivered their closings.

Decision

The Board finds by a preponderance of the evidence through the testimony of the witnesses and the supporting evidence that the Respondent was credible in his testimony and was not in violation of any orders or procedures. There was no testimony that the Respondent failed to maintain control of his weapon; therefore, the Respondent is acquitted of all charges related to this complaint and any duty restrictions or other restrictions should be immediately lifted and he should be returned to full duty - if not already done so. This case failed in that the investigation lacked any supporting evidence of the allegation that the Respondent failed to maintain control of his service weapon. The act of the Respondent placing his duty weapon in a zippered messenger bag and maintaining constant control of this same bag is not a loss of control of the weapon. Additionally, this is not a case of the improper storage of a weapon as the weapon is still in the possession of the Respondent and is equivalent to an officer transporting a weapon on the firing range or elsewhere in a "gear bag" when the bag remains in his/her control.

Conclusions of Law

Based on the evidence presented and after assessing the credibility of the witnesses and the weight to be given the evidence in the record, the Board finds that Respondent Dorian J. Swain, Star Number 16579, CCDOC, did not violate General Order 3-8, Sections I, III, A4; General Order 3.14, Section I, Section III, I2a and c; General Order 4.1, III, B2; and Article X, Paragraph B3, of the Rules of the Cook County Sheriff's Merit Board.

Wherefore, based on the foregoing, it is hereby ordered that Respondent Dorian J. Swain, is acquitted of all charges in this matter, effective February 23, 2016.

[Redacted]
James P. Nally, Chairman

[Redacted]
Byron Brazier, Vice Chairman

[Redacted]
Gray Mateo-Harris, Board Member

[Redacted]
John J. Dalicandro, Secretary

[Redacted]
Jennifer E. Bae, Board Member

[Redacted]
Kim R. Widup, Board Member

[Redacted]
Patrick Brady, Board Member

[Redacted]
Vincent T. Winters, Board Member

Dated:

February 3, 2017